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12 UNITED STATES DISTRICT COURT
13
14 NORTHERN DISTRICT OF CALIFORNIA
15

16 THE BOARD OF TRUSTEES, in their
17 capacities as Trustees of the LABORERS
18 HEALTH AND WELFARE TRUST FUND
19 FOR NORTHERN CALIFORNIA;
20 LABORERS VACATION-HOLIDAY TRUST
21 FUND FOR NORTHERN CALIFORNIA;
22 LABORERS PENSION TRUST FUND FOR
23 NORTHERN CALIFORNIA; and LABORERS
24 TRAINING AND RETRAINING TRUST
25 FUND FOR NORTHERN CALIFORNIA,

26 Plaintiffs,

27 v.

28 C. APARICIO, CEMENT CONTRACTOR,
INC. , a California Corporation, AMERICAN
CONTRACTORS INDEMNITY COMPANY,
a California Corporation,

Defendants.

No.

**COMPLAINT FOR BREACH OF
CONTRACT, DAMAGES, BREACH OF
FIDUCIARY DUTY, AUDIT AND
ENFORCEMENT OF CLAIM
AGAINST CALIFORNIA
CONTRACTORS LICENSE BOND
(ERISA 29 U.S.C. §1001, ET SEQ., 29
U.S.C. §185, BUSINESS AND
PROFESSIONS CODE §7071.5)**

1 Plaintiffs complain of C. Aparicio, Cement Contractor, Inc., and for cause of action
 2 allege:

3 **JURISDICTION AND INTRADISTRICT ASSIGNMENT**

4 **I.**

5 This action arises under and is brought pursuant to Section 502 of the Employee
 6 Retirement Income Security Act, as amended (ERISA), 29 U.S.C. § 1132, and section 301 of the
 7 Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Venue properly lies in this district
 8 court since contributions are due and payable in the County of San Francisco. The Court has
 9 supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs' claim to enforce a claim against
 10 C. Aparicio, Cement Contractor, Inc.'s California State Contractor's License Bond as it arises
 11 from the same transaction or occurrence to this action arising under ERISA and the LMRA.
 12 Therefore, intradistrict venue is proper.

13 **PARTIES**

14 **II.**

15 At all times material herein, Plaintiffs, The Board of Trustees, were Trustees of the
 16 Laborers Health and Welfare Trust Fund for Northern California (hereinafter "Welfare Fund");
 17 Laborers Pension Trust Fund for Northern California (hereinafter "Pension Fund"); Laborers
 18 Vacation-Holiday Trust Fund for Northern California (hereinafter "Vacation Fund"); and the
 19 Laborers Training and Retraining Trust Fund for Northern California (hereinafter "Training
 20 Fund") (collectively referred to as "Trust Funds"). At all times material herein, each of the
 21 above-named Trust Funds was, and now is, an employee benefit plan created by a written Trust
 22 Agreement subject to and pursuant to section 302 of the LMRA (29 U.S.C. § 186), and a multi-
 23 employer employee benefit plan within the meaning of sections 3, 4 and 502 of ERISA (29
 24 U.S.C. §§ 1002, 1003 and 1132). Each of the above-named Trust Funds is administered by a
 25 Board of Trustees which may bring this action in the name of the Trust Funds pursuant to the
 26 express provisions of the Trust Agreements. All of the above-named Trust Funds and their
 27 respective Board of Trustees shall hereinafter be designated collectively as "Plaintiffs".

1 **III.**

2 At all times material herein, C. Aparicio, Cement Contractor, Inc. (hereinafter referred to
3 as “C. Aparicio, Cement Contractor, Inc.”), has been an employer within the meaning of section
4 3(5) and section 515 of ERISA (29 U.S.C. §§ 1002(5), 1145) and an employer in an industry
5 affecting commerce within the meaning of section 301 of the LMRA (29 U.S.C. § 185).

6 **IV.**

7 Defendant American Contractors Indemnity Company (hereinafter “American Contractors
8 Indemnity”) is, and at all times relevant to this action was, a corporation, engaged in the business
9 of issuing surety bonds. Plaintiffs are informed and believe and allege that said C. Aparicio,
10 Cement Contractor, Inc. is a licensed surety in the State of California.

11 **ALLEGATIONS APPLICABLE TO ALL CLAIMS FOR RELIEF**

12 **V.**

13 C. Aparicio, Cement Contractor, Inc. is signatory and bound to a written collective
14 bargaining agreement with the Northern California District Council of Laborers (“Union”), a
15 labor organization within the meaning of section 301 of the LMRA (29 U.S.C. § 185). C.
16 Aparicio, Cement Contractor, Inc. became subject to all the terms and conditions of the Laborers
17 Master Agreement (hereinafter “Master Agreement”) by virtue of signing a Memorandum of
18 Agreement (hereinafter “Memorandum Agreement”) with the Union. The Memorandum
19 Agreement incorporated the Master Agreement by reference. C. Aparicio, Cement Contractor,
20 Inc. is signatory and bound to a written collective bargaining agreement with the Northern
21 California District Council of Laborers (“Union”), a labor organization within the meaning of
22 section 301 of the LMRA (29 U.S.C. § 185). C. Aparicio, Cement Contractor, Inc. became
23 subject to all the terms and conditions of the Laborers Master Agreement (hereinafter “Master
24 Agreement”) by virtue of signing a Memorandum of Agreement (hereinafter “Memorandum
25 Agreement”) with the Union. The Memorandum Agreement incorporated the Master Agreement
26 by reference. A true and correct copy of the Master Agreement for the period 2018 to 2023 is
27 attached hereto as Exhibit “A”. A True and accurate copy of the Memorandum Agreement is
28

1 attached hereto as Exhibit “B” and is incorporated by reference herein. The Master Agreement
 2 by its terms incorporates the various Trust Agreements establishing each of the Plaintiffs Trust
 3 Funds. By said Master Agreement, C. Aparicio, Cement Contractor, Inc. promised that it would
 4 contribute and pay to Plaintiffs the hourly amounts required by the Agreements for each hour paid
 5 for or worked by any of its employees who performed any work covered by said Agreements, and
 6 that it would be subject to and bound by all of the terms, provisions and conditions of the Trust
 7 Agreements. The Master Agreement by its terms incorporates the various Trust Agreements
 8 establishing each of the Trust Funds. C. Aparicio, Cement Contractor, Inc. promised that
 9 C. Aparicio, Cement Contractor, Inc. would contribute and pay to the Trust Funds the hourly
 10 amounts required by the Master Agreement for each hour paid for or worked by any of
 11 C. Aparicio, Cement Contractor, Inc.’s employees who performed any work covered by the
 12 Master Agreement, and that C. Aparicio, Cement Contractor, Inc. would be subject to and bound
 13 by all of the terms, provisions, and conditions of the Trust Agreements.

14 VI.

15 The Master Agreement by its terms incorporates the various Trust Agreements
 16 establishing each of the Trust Funds. By said Master Agreement, C. Aparicio, Cement
 17 Contractor, Inc. promised to contribute and pay to Plaintiffs the hourly amounts required by said
 18 Agreements for each hour paid for or worked by any of its employees who performed any work
 19 covered by the Agreements, and that it would be subject to and bound by all of the terms,
 20 provisions, and conditions of the Trust Agreements as incorporated by the terms of the Master
 21 Agreement.

22 VII.

23 The Agreements provide for prompt payment of all delinquent contributions to the various
 24 Trust Funds, and provide for the payment of interest on all delinquent contributions, liquidated
 25 damages as a reasonable attempt to cover the damages incurred by the Trust Funds in the event of
 26 a breach by the employer where it would be impracticable or extremely difficult to calculate
 27 losses at the time the Agreements were negotiated, attorneys’ fees and other collection costs, and
 28

1 for the audit of the signatory employer or employers' books and records in order to permit the
 2 Plaintiffs to ascertain whether all fringe benefit contributions have been timely paid as required
 3 by the applicable labor agreements and law.

4 **FIRST CLAIM FOR RELIEF**
 5 **(BREACH OF CONTRACT)**

6 **VIII.**

7 Plaintiffs incorporate and reallege by reference all the allegations stated hereinabove.

8 **IX.**

9 C. Aparicio, Cement Contractor, Inc. failed to pay contributions owed to the Trust Funds
 10 in the amount of \$208,516.55 based upon covered work performed by its employees during the
 11 months of August 2019-January 2020. C. Aparicio, Cement Contractor, Inc. entered into an
 12 agreement with the Trust Funds, a copy of which is attached hereto as **Exhibit "C"** relating to the
 13 delinquent contributions in which it agreed that C. Aparicio, Cement Contractor, Inc. would make
 14 three (3) payments of \$28,251.62 starting February 28, 2020 for three (3) weeks and \$15,000.00
 15 weekly payments until the balance is paid in full by May 15th 2020. The Agreement additionally
 16 provides:

17 Your payment plan will remain in effect as long as future
 18 Contribution Reports are received and paid on time, starting with
 19 **the February 2020** Contribution Report, due no later than **March**
 20 **25th, 2020.** If the above conditions are not met, the monthly
 21 payment plan will become invalid and all contributions will be due
 22 **immediately.**

23 Please be advised if payments are not received the Trust Fund will
 24 move forward with Civil Action.

25 **X.**

26 C. Aparicio, Cement Contractor, Inc. made three payments in the amount of \$28,251.62
 27 each under the payment plan agreement, see Exhibit C hereto, and then defaulted on the terms of
 28 the payment plan agreement by failing to make any further payments. An accounting of the three
 payments received is included in Exhibit C hereto at page two. Upon C. Aparicio, Cement
 Contractor, Inc.'s failure to make the payment due on March 20, 2020, payment plan agreement
 was rendered invalid.

XI.

There is now due and owing and unpaid to Plaintiffs contributions in the amount of at least \$122,445.78 for contributions reported as owed based upon covered work performed by C. Aparicio, Cement Contractor, Inc.'s employees during the time period beginning October 2019 through January 2020, but not paid. Additionally, liquidated damages and interest in the amount of at least \$5,859.26 are owed in relation to the aforementioned delinquent contributions. Liquidated damages and interest in the amount of at least \$9,961.83 are owed for contributions paid, but paid late, in the amount for the period of October 2018 through September 2019.

XII.

Plaintiffs are the intended third-party beneficiaries of the Agreements, but Trust Fund contribution delinquencies are excluded from the arbitration provisions of the Agreements.

XIII.

Plaintiffs have complied with all conditions on their part to be performed under the terms of the applicable Agreements.

XIV.

Plaintiffs are entitled to reasonable attorneys' fees, interest, and other reasonable expenses incurred in connection with this matter due to C. Aparicio, Cement Contractor, Inc.'s failure and refusal to pay all fringe benefit contributions due and owing pursuant to the terms of the applicable Master Agreement, Trust Agreements, and ERISA section 502(g)(2) (29 U.S.C. § 1132(g)(2)).

SECOND CLAIM FOR RELIEF
(ACTUAL DAMAGES FOR BREACH OF CONTRACT)

XV.

Plaintiffs incorporate and reallege by reference all the allegations stated hereinabove.

XVI.

C. Aparicio, Cement Contractor, Inc. has failed, neglected and refused to make timely fringe benefit contributions as required by the applicable Master Agreements and Trust Agreements, and have caused Plaintiffs actual damages in an amount to be proven at trial.

THIRD CLAIM FOR RELIEF
(AUDIT)

XVII.

Plaintiffs incorporate and reallege by reference all the allegations stated hereinabove.

XVIII.

Plaintiffs believe that additional amounts may be due and owing and also pray for an audit to determine same.

THIRD CLAIM FOR RELIEF
(ENFORCEMENT OF CLAIM AGAINST CALIFORNIA CONTRACTORS LICENSE BOND AGAINST AMERICAN CONTRACTORS INDEMNITY PURUSANT TO CALIFORNIA BUSINESS AND PROFESSIONS CODE §7071.5(e))

XIX.

Plaintiffs reallege and incorporate by reference the allegations set forth hereinabove.

XX.

Plaintiffs are informed, believe and allege that C. Aparicio, Cement Contractor, Inc. as principal, and American Contractors Indemnity, as surety, executed Bond of Qualifying Individual number 100486344 in connection C. Aparicio, Cement Contractor, Inc.'s California Contractors License Number 267391.

XXI.

Pursuant to California Business and Professions Code §7071.5(d), the contractor's bond shall be for the benefit of, ". . . Any person or entity, including an express trust fund described in Section 3111 of the Civil Code, to whom a portion of the compensation of an employee of a licensee is paid by agreement with that employee or the collective bargaining agent of that employee, damaged as the result of the licensee's failure to pay fringe benefits for its employees, including, but not limited to, employer payments described in Section 1773.1 of the Labor Code and regulations thereunder (without regard to whether the work was performed on a private or public work). . . . "

XXII.

There is now due and owing and unpaid to Plaintiffs contributions in the amount of at least \$122,445.78 for contributions reported as owed based upon covered work performed by C. Aparicio, Cement Contractor, Inc.'s employees during the time period beginning October 2019 through January 2020, but not paid.

XXIII.

A written claim in the amount of \$122,455.78 was given to the surety and the bond principal. The written notice was within six months from the date on which the benefit violation was discovered.

XXIV.

Under California Business and Professions Code §7071.6, Plaintiffs are entitled to the payment of \$7,000.00 from American Contractors Indemnity to satisfy their claim against the bond number 100486344.

WHEREFORE, Plaintiffs pray judgment against C. Aparicio, Cement Contractor, Inc., as follows:

1. That C. Aparicio, Cement Contractor, Inc. be ordered to pay at least \$122,445.78 in unpaid contributions, and liquidated damages and interest in the amount of at least \$5,8959.26, based on for the period of October 2019 to January 2020;

2. That C. Aparicio, Cement Contractor, Inc. be ordered to pay liquidated damages and interest in the amount of at least \$9,961.83 on contributions paid but paid late for the period of October 2018 through September 2019;

3. That C. Aparicio, Cement Contractor, Inc. be ordered to pay actual damages according to proof;

4. That this Court issue an Order directing and permanently enjoining C. Aparicio, Cement Contractor, Inc. to timely submit to Plaintiffs all reports and contributions due and owing by C. Aparicio, Cement Contractor, Inc. plus interest, liquidated damages, attorneys' fees, and costs as provided in ERISA sections 502(a)(3) and (g)(2) (29 U.S.C. § 1132(a)(3), (g)(2));

1 5. That this Court issue an Order permanently enjoining C. Aparicio, Cement
2 Contractor, Inc., for so long as it remains obligated to contribute to the Trust Funds, from failing,
3 neglecting, or refusing to timely submit required monthly contributions reports and payments as
4 required by the terms of the collective bargaining agreements, Trust Agreements and ERISA
5 sections 502(a)(3) and (g)(2) (29 U.S.C. § 1132(a)(3), (g)(2));

6 6. That C. Aparicio, Cement Contractor, Inc. be ordered to pay attorneys' fees;

7 7. That C. Aparicio, Cement Contractor, Inc. be ordered to submit to an audit
8 between Plaintiffs and C. Aparicio, Cement Contractor, Inc.;

9 8. That C. Aparicio, Cement Contractor, Inc. be ordered to pay costs of suit herein;

10 9. That this Court grant such further relief as this Court deems just and proper and;

11 10. That this Court retain jurisdiction of this matter to enforce the Order compelling
12 an Audit and payment of all amounts found due and owing.

13 **WHEREFORE**, Plaintiffs pray judgment against American Contractors Indemnity, as
14 follows:

15 11. For judgment on the payment bond against American Contractors Indemnity, in
16 the sum of \$7,000.00 in favor of Plaintiffs.

17 Dated: May 11, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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19
20 By: /s/ Tracy L. Mainguy
TRACY L. MAINGUY
Attorneys for Plaintiffs

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